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Nos. ~~1354~~ and ~~1355~~

In the Supreme Court of the United States

OCTOBER TERM, 1944 1945

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

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v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY AND STUART SOLOMON BROWN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Seventh Circuit (AR. 237),[1]

[1] The record in this case consists of three separately printed records, the original record in this Court on review of respondents' convictions (Nos. 4 and 5, 1942 Term); the record made on respondents' petition for certiorari for review of the

reversing the judgment of the District Court and granting the respondents a new trial.

OPINIONS BELOW

Neither the memorandum opinion of the District Court denying respondents' amended motion for a new trial (AR. 133–169) nor the majority and dissenting opinions in the Circuit Court of Appeals (AR. 207–236) are as yet reported. The prior, unanimous opinion of the court below affirming the District Court's denial of respondents' original motion for a new trial (R. 578–585) is reported at 142 F. 2d 588. The memorandum opinion of the District Court on the original motion (R. 460–516) is not reported. The prior opinions of the Circuit Court of Appeals and of this Court on appeal from the respondents' convictions are reported at 123 F. 2d 111, and 319 U. S. 503, respectively.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 2, 1945. (AR. 237.) The jurisdiction of this Court is invoked under Sec-

judgment of the Circuit Court of Appeals affirming the action of the District Court in denying respondents' subsequently filed motion for a new trial (Nos. 153 and 154, 1944 Term); and a record of additional proceedings on respondents' amended motion for a new trial. The first record on the motion for a new trial will be referred to by the designation "R." and the record of additional proceedings on the amended motion by the designation "AR." Reference to the original record on review of respondents' convictions will be shown by record references to Nos. 4 and 5, 1942 Term.

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the court below applied improper standards in reviewing and reversing the action of the District Court denying respondents' second, amended motion for a new trial based on allegedly newly discovered evidence that a Government witness testified falsely at respondents' trial.

STATEMENT

Respondents' convictions were affirmed by this Court on June 7, 1943. Execution of the Court's judgment has been delayed since that time by proceedings on respondents' subsequently filed original and amended motions for a new trial which purportedly were based on alleged newly discovered evidence that William Goldstein, a Government witness, testified falsely at the trial. After affirming the action of the trial court in denying respondents' original motion, the Circuit Court of Appeals, with one judge dissenting, has now held that the respondents are entitled to a new trial.

The history of the proceedings and the nature of the review in the court below necessitate a somewhat extended statement of facts.

PRIOR PROCEEDINGS

On March 29, 1940, an indictment in five counts was returned against the respondents and others[2] in the District Court for the Northern District of Illinois. The first four counts charged the defendant Johnson with willful attempts to defeat and evade a large part of his income taxes for the calendar years 1936–1939, inclusive, and charged the other defendants with willfully aiding and abetting Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy. All respondents except Brown were found guilty on all five counts. Brown was found guilty on Counts 3 and 4, the substantive counts for 1938 and 1939, and on the conspiracy count. Johnson was sentenced to concurrent sentences totaling five years' imprisonment and a $10,000 fine. Lesser concurrent sentences were imposed on the other respondents. *United States* v. *Johnson*, 319 U. S. 503, 505–506.

On appeal from the judgments of conviction, the Circuit Court of Appeals reversed principally on the ground that the indictment was returned by an illegally constituted grand jury. *United States*

[2] The indictment was dismissed as to four defendants prior to trial, three defendants were acquitted by the jury, and the defendant Flanagan died pending review of the judgment of conviction against him. See R. 461, n. 1; *United States* v. *Johnson*, 319 U. S. 503, 520, n. 1.

v. *Johnson*, 123 F. 2d 111 (C. C. A. 7). This Court granted certiorari and reversed the decision of the Circuit Court of Appeals (319 U. S. 503), sustaining the convictions of all respondents.

On June 25, 1943, three weeks after this Court affirmed the convictions, counsel for respondent Johnson wrote to the Attorney General, charging that Goldstein had committed perjury, requesting that an investigation be made and criminal proceedings instituted against him, and submitting affidavits intended to prove the charge of perjury. (R. 60–80, 159.) An extensive investigation was conducted by the Government, the results of which demonstrated to us that Goldstein had not testified falsely at the trial. (See letter written by the Solicitor General, as Acting Attorney General, to respondents' counsel on September 13, 1943, R. 265–266.)

In the meantime respondents took steps to and subsequently did obtain a remand of the case to the trial court for the filing of a motion for a new trial. (R. 9–10.) The motion (R. 13–17), filed on October 29, 1943, with leave of the trial court (R. 12), purported to be based on allegedly newly discovered evidence that Goldstein had testified falsely at respondents' trial. Numerous affidavits were submitted in support of the motion (R. 81–242) and others were filed later (R. 336–338). Respondents also submitted a brief in support of the motion (R. 17–55) and the Government filed an answer (R. 55–58), a brief in opposition (R.

280–314), and a number of affidavits (R. 243–279, 315–316, 339–453). A hearing on the motion was had on November 15, 1943 (R. 454), before Judge Barnes (see R. 534–536), who had presided at the respondents' trial (Nos. 4 and 5, 1942 Term, 1 R. 1). The trial court filed a comprehensive opinion on December 28, 1943 (R. 460–516) and three days later entered an order denying the motion (R. 534–536).

On appeal the Circuit Court of Appeals unanimously affirmed the order of the trial court. (*United States* v. *Johnson*, 142 F. 2d 588 (C. C. A. 7; R. 578–586). In doing so the court stated that it had "carefully considered the record before us and the action of the trial court" (R. 583), that it could not say "that the so-called newly discovered evidence inevitably leads to the conclusion that Goldstein had testified falsely" (R. 584) and that the trial court had not abused its discretion in denying the motion (R. 583, 584, 575).

Respondents then filed a petition for certiorari (Nos. 153 and 154, 1942 Term), which we opposed. Shortly before the convening of the 1944 term of this Court and while the petition for certiorari was pending, counsel for respondents requested the Government to inform the Court that Theodore Goldstein, William Goldstein's son, had recently filed income tax returns covering the rentals from the Albany Park Bank Building. In line with his testimony with respect to other

properties, Goldstein had testified that he purchased the Albany Park Bank Building at respondent Johnson's request with money furnished by Johnson and took title in the name of his son Theodore, and that subsequently a quitclaim deed on the building was delivered to Johnson. (Nos. 4 and 5, 1942 Term, 2 R. 56–57.)

Through an investigation conducted by the Bureau of Internal Revenue, we verified the fact that amended and delinquent income tax returns on the Albany Park Bank Building had recently been filed by Theodore Goldstein, and also ascertained the circumstances under which they were filed, which were, briefly, that the revenue agents in Chicago, ignoring Goldstein's protestations that his son was only the record title holder and not the actual owner of the building, had insisted on the filing of the returns on the theory that Theodore was liable for tax on the rents from the building because he was the record title holder. While we believed that the circumstances under which the returns were filed were such as to dissipate any relevance the filing of the returns might otherwise have had, we acceded to respondents' request. In a supplemental memorandum in opposition we informed the Court of the filing of the returns and of the circumstances under which they were filed. On motion of the present respondents, the Court deferred consideration of the petition for certiorari conditioned upon the

prompt filing in the Circuit Court of Appeals of a motion to reopen proceedings on the motion for new trial and until the disposition of the motion by the Circuit Court of Appeals. (AR. 20–21.) This resulted in the second remand to the trial court (AR. 18–19) and dismissal of the petition for certiorari.

Pursuant to motion of the respondents (AR. 23–25), the trial court ordered the production of the income tax returns filed by Theodore Goldstein (AR. 26–27). Respondents then filed an amended motion for a new trial (AR. 27–28), relying primarily on the filing of the returns by Theodore Goldstein to show that William Goldstein testified falsely at the trial. The Government filed an answer together with several affidavits which showed the innocuousness, so far as the charge against Goldstein was concerned, of the filing of the returns by Theodore Goldstein. (See AR. 87–112.) Respondents filed a reply (AR. 112–132) and the hearing on the motion, held on December 11, 1944, was again before Judge Barnes, the trial judge (AR. 133). On December 15, 1944, Judge Barnes filed an opinion in which he exhaustively reviewed the history of and proceedings in the case (AR. 133–169) and again entered an order denying the motion for a new trial (AR. 171–173).

On this appeal, the majority of the Circuit Court of Appeals (Major, C. J., and Sparks, C. J.) held that the trial court had abused its dis-

cretion in denying the motion, basing its opinion primarily on the evidence submitted on the *original* motion. (AR. 207–230.) Judge Minton dissented, stating, among other things, that additional evidence adduced in support of the motion added nothing to the proof that was submitted to the court on the original motion when the court, through the same three judges, had, after having "carefully considered the record" (R. 583), affirmed the action of the trial court in denying the motion (AR. 230–236). It is this action of the majority in granting respondents a new trial which we are now requesting this Court to review.

TRIAL BACKGROUND OF CASE

Theory of prosecution—"ownership of gambling houses" and "expenditure" theories of proof

The trial theory of the prosecution was that respondent Johnson was the proprietor of a number of gambling houses in and around Chicago from which he derived large amounts of unreported income, and that other defendants posed as the owners, thereby concealing Johnson's interest. The Government undertook to show that the various gambling houses, although ostensibly separately owned, were actually operated as a unit, thus indicating central control and ownership, and that Johnson was so identified with the gambling houses as to prove that he was the true owner. Considerable evidence was also introduced to show

the magnitude of the operations of these houses, including their currency exchange transactions which reflected income to Johnson in excess of the amounts he reported in his income tax returns. The evidence on this aspect of the case has been referred to throughout the proceedings as the "ownership" theory of proof. As this Court's opinion in the case shows, this was the predominant part of the Government's case. This Court stated that the evidence "amply justified" the jury in finding that the gambling houses were under a single domination and that Johnson owned a proprietary interest in the network of gambling houses and was not merely a patron or an occasional accommodating dealer when other patrons desired to play for stakes beyond the conventional limit (319 U. S., at 516–517) and that the jury, having been justified in finding that the individual defendants were screens behind which Johnson operated, was also justified by "solid proof" in finding that there were winnings from these houses on which Johnson attempted to evade income tax payments. The testimony of Goldstein, now held to be false by the Circuit Court of Appeals, had little bearing on this, the "ownership" theory of proof, which turned on the issue of the proprietorship of gambling houses.

Goldstein's testimony was a part of the "expenditure" theory of proof which this Court stated "reinforced" the conclusion that Johnson had large, unreported income. (319 U. S. at 517.)

The proof on this theory was designed to show that Johnson's cash expenditures during each of three of the four years covered by the indictment were in excess of his available cash resources and reported income. Our showing on some of these expenditures was made initially through the testimony of Goldstein who, like some of the persons who testified for the Government in connection with the "ownership" theory of proof, was an "obviously unwilling" witness for the Government.[3] (319 U. S. at 516.)

Goldstein's testimony

Goldstein was shown certain escrow agreements, later introduced in evidence, which revealed practically all of the details of the purchase of several

[3] It will be seen later that Goldstein's testimony regarding the purchase of certain properties necessarily had to concern either respondent Johnson or William R. Skidmore or both. Goldstein had acted as attorney for Skidmore (Nos. 4 and 5, 1942 Term, 2 R. 65) and by Johnson's own admission had also acted for Johnson in the purchase of two of these properties (*id.*, 3 R. 982–983; see also *id.*, 3 R. 974, 975; 4 R. 8). Both Goldstein and Skidmore had been indicted with Johnson and the other respondents, as Goldstein testified on cross-examination (*id.*, 2 R. 65). While the indictment was dismissed as to them before trial, Skidmore was later convicted of income tax evasion on a previous indictment under the "expenditure" theory of proof—proof which did not, however, involve any of the properties as to which Goldstein testified in this case. See *United States* v. *Skidmore*, 123 F. 2d 604 (C. C. A. 7), certiorari denied, 315 U. S. 800 (No. 813, 1941 Term). Goldstein was already under indictment for perjury, as he also testified on cross-examination (Nos. 4 and 5, 1942 Term, 2 R. 65).

properties and of two escrow deposits on unconsummated sales, including the fact that Goldstein was the purchaser and that, as to all of the purchased properties except one (Sunny Acres Farm), title had been taken in someone else's name, e. g., his law partner Isador Goldstein, or his son Theodore, or one of his stenographers, these persons apparently still being the title holders of record. This resulted in testimony by Goldstein which consisted of facts shown by the escrow agreements and the following three facts testified to with respect to each item: That he made payment in currency; that the money was given to him by respondent Johnson with the request that he make the purchase or escrow deposit, as the case might be; and that a quitclaim deed was subsequently delivered to Johnson, except in the case of the two escrows involving unconsummated sales. (Nos. 4 and 5, 1942 Term, 2 R. 55–62.) The properties involved were as follows (*ibid.*):

> Sunny Acres Farm (consisting of two parcels, one of Sunny Acres and one of adjoining Du Page County real estate, purchased separately);
>
> Bon Air properties (which included the Bon Air Country Club, the Green House, the White House, and a gas station, all purchased separately);
>
> Curran Farm (adjacent to the Bon Air properties);

Albany Park Bank Building (in which was located the Lawrence Avenue Currency Exchange, operated by respondent Brown and used by Johnson's gambling house operators, and the Albany Park Safe Deposit Vault Company);

9730 So. Western Avenue (in which the Western Club, a gambling establishment, was operated for a time by the defendant Creighton); and

The Dells.

The two escrow deposits were in the amounts of $10,000 and $7,500, the $10,000 deposit being made on property lying between Bon Air and the Curran Farm.

Relationship of Goldstein's testimony to "expenditure" theory of proof

The full purchase prices of these properties, as well as the amounts of the two escrows, were included in the Government's computation of Johnson's expenditures and cash receipts, the computation showing a total excess of expenditures over cash receipts in the amount of $640,387.86 for the period 1932 to 1939, inclusive. (See chart attached to the inside of the back cover of our Brief on Reargument, Nos. 4 and 5, 1942 Term.) That a part of these property and escrow expenditures was properly charged to Johnson was verified by Johnson's own testimony. He corroborated Goldstein's testimony regarding the

purchase of the Sunny Acres Farm and adjoining real estate, admitting full ownership of those priorities (*id.*, 3 R. 982–983), and stated that he had paid one-half of the purchase price of each of the other properties except the Albany Park Bank Building, admitting to one-half ownership of them.[4]

Otherwise, Goldstein's testimony was pertinent only insofar as it tended to corroborate the Government's position as to two other expenditure charges against Johnson—the amounts expended for improvements on Bon Air and the property at 9730 So. Western Avenue. On the chart we submitted to this Court with our Brief on Reargument (*supra*, p. 13), the total amount charged against Johnson on Bon Air (including the Curran Farm), mostly for improvements, was $707,645, whereas Johnson said he and William R. Skidmore each owned a one-half interest in the property and that he, Johnson, had spent only approximately $354,000 as his one-half share of the cost, maintenance and operation of the property. (*Id.*, 3 R. 955–956, 983.) The improvements on the property at 9730 So. Western Avenue amounted to only $22,400. At the trial, the charges of expenditures for improvements on these two properties raised the issue whether Johnson was the sole owner of the properties or only a one-half owner with Skidmore, the Bon Air charge being

[4] Nos. 4 and 5, 1942 Term, 3 R. 950, 952, 955–957, 960–961.

the only item of substantial amount. A great deal of evidence was introduced by both the prosecution and defense on the issue of ownership of Bon Air and the issue was submitted to the jury through the testimony of expert witness Clifford (*id.*, 4 R. 4–52), who testified for the Government, and of expert witness Sullivan (*id.*, 3 R. 991–995), who testified for the defense.

Goldstein's testimony clearly had no significant effect on the jury's conclusions regarding these disputed expenditure items. The computation by Government witness Clifford was submitted to the jury at the end of the Government's case in chief and through his testimony the jury was advised that, on the basis of the Government's evidence, the total of the excess of Johnson's expenditures over cash receipts was $474,349.54. (*Id.*, 4 R. 15.) When Johnson took the witness stand later he admitted expenditures of approximately $200,000 not charged against him by the Government. (R. 513–514.) This more than covered the total disputed amount on the purchase of the properties and the two escrow deposits. No further computation was submitted to the jury including these additional expenditures.[5] And, while Goldstein's testimony corroborated the Government's position

[5] The admitted additional expenditures were added to the chart we submitted to this Court in our Brief on Reargument, that chart showing a total excess of expenditures over cash receipts of $640,387.86 after minor adjustments on some of the other items.

that Johnson was the sole owner of Bon Air and chargeable for the full amount expended for improvements on that property, Goldstein's testimony was not the basis of the charge for the Bon Air improvements nor could it have been regarded by the jury as anything more than corroborative evidence. In the first place, as will be shown later, Goldstein made it plain on cross-examination that he was testifying as to who gave him the money to purchase these properties, not as to the extent of Johnson's ownership in them. Secondly, the Government introduced direct proof that Johnson was the sole owner of Bon Air, including Johnson's own prior admissions and his statements to an accountant to the effect that he alone had paid for the Bon Air properties and improvements thereon.[8] The issue whether Johnson was

[8] Two revenue agents related a conversation which they had with Johnson in November of 1939. Both stated that Johnson told them he was the owner of 9730 So. Western Avenue and of Bon Air. (Nos. 4 and 5, 1942 Term, 2 R. 117–118; 4 R. 8.) One testified that Johnson said nothing as to whether Skidmore had an interest in the property at 9730 So. Western Avenue although he had asked him. (*Id.*, 2 R. 118.) An accountant testified that Johnson told him that all of the stock of the Bon Air Catering Company, the corporation which operated Bon Air, should be charged to him (*id.*, 3 R. 775–776) and that the cost of improvements on the Bon Air property entered on the catering company books as assets and credited to Johnson and others was all advanced by him (*id.*, 2 R. 53–54). Johnson also made the latter statement to a revenue agent in November of 1939. (*Id.*, 4 R. 8.) In a formal statement given by Johnson on March 27, 1939, and introduced in evidence, Johnson stated that he had had no business

the sole or only one-half owner of Bon Air (including the Curran Farm), and thus chargeable with more than he admitted expending on the properties, was also the subject matter of considerable evidence introduced by the defense.[7] For present purposes, however, the important fact is that Goldstein's testimony could have had only slight, if any, weight in the minds of the jury in

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transactions with Skidmore, except a loan he had made to Skidmore. (*Id.*, 2 R. 411.) Skidmore's name did not appear on the Bon Air records. (*Id.*, 3 R. 906, 913, 982.) For a more detailed summary of the Government's evidence on this ownership point, see our Brief on Reargument, Nos. 4 and 5, 1942 Term, pp. 102–104, 106–107. In that brief we of course included Goldstein's testimony in our summary of the evidence supporting submission of the full amount of the Bon Air expenditures to the jury.

[7] Johnson asserted that William R. Skidmore owned a one-half interest in the Bon Air properties and Curran Farm (as well as in The Dells and property at 9730 So. Western Avenue); that Skidmore had paid one-half of the expenses on these properties; that Skidmore had bought the properties but did not want title taken in his name; and that title stood in his, Johnson's, name. (*Id.*, 3 R. 955–957, 961–965, 967–970, 979, 982, 983–984.) The defendant Wait, formerly employed at Bon Air, gave similar testimony. (*id.*, 3 R. 896–898, 900, 910–913.) Two witnesses testified to facts tending to show that Skidmore was involved in the purchase of Bon Air. (*Id.*, 3 R 575 Ex. J–6, 576. See also 3 R. 914–915.) Four witnesses recited instances of payment of Bon Air bills by Skidmore or charges to him. (*Id.*, 2 R. 81; 3 R. 916–917, 919–920 (Ex. J–7A to J–7E, 3 R. 1037), 930.) Several former Bon Air employees testified to acts of ownership by Skidmore. (*Id.*, 3 893–894, 916, 922, 923, 925, 928; see also *id.*, 3 R. 956.) For a more detailed summary of respondents evidence, see Brief of William R. Johnson on Re-Argument, No. 4, 1942 Term, pp. 76–78.

connection with the charge of Bon Air improvements.

The question whether Johnson had actually made these disputed expenditures was itself only an incidental issue. Even if all of the Government's evidence regarding these properties and two escrows were rejected and Johnson's testimony as to all of them accepted in full, including his testimony that he spent some $350,000 less on Bon Air and the Curran Farm than he could be charged with having expended on the basis of the Government's evidence, Johnson's expenditures would still exceed his cash receipts by a substantial amount (R. 513–514), showing that Johnson had unreported income. The Government was not of course required to prove the exact amount of Johnson's unreported income, as this Court has stated. (319 U. S. at 517.) Accordingly, the exclusion of all of these disputed expenditure items would not alter the fact that the "expenditure" theory of proof reinforced the "ownership" theory of proof. In addition, the jury may have convicted respondents on the "ownership" theory of proof alone, the evidence on that theory being amply sufficient of itself to support the convictions, as this Court has held (*supra*, p. 10).

Cross-examination of Goldstein

The respondents have consistently attempted to obscure the actual extent of Goldstein's testimony,

asserting that Goldstein placed the ownership of these properties in Johnson, and have finally persuaded the Circuit Court of Appeals to accept this view. It is pertinent therefore to ascertain whether Goldstein's testimony may have been so interpreted by the jury.

As already stated, Goldstein circumspectly testified that he purchased these properties and made the two escrow deposits at Johnson's request with money furnished him by Johnson and that subsequently quitclaim deeds were delivered to Johnson. On cross-examination, Goldstein stated that he did not know whether Johnson got full title to the property at 9730 So. Western Avenue and was not sure whether anyone else was interested in the property. (Nos. 4 and 5, 1942 Term, 2 R. 64.) After being shown the deeds to Johnson, he recollected that Johnson received an undivided one-half interest by conveyance from Ann Homan and her husband, who got title through Isadore Goldstein, Goldstein's nominee, and stated that, as he remembered, Skidmore got the other half. (*Id.*, 2 R. 64, 65.) He reiterated, however, that he was positive it was Johnson who gave him the money to make the purchase. (*Id.*, 2 R. 66.) As to The Dells property, Goldstein testified on cross-examination that "I don't know, but that may be so, that Mr. Johnson only owns half of the Dells property and only paid half of the price." (*Id.*, 2 R. 67.) Accordingly, Goldstein's testimony was

that Johnson was *not* the sole owner of the property at 9730 So. Western Avenue and might not be the sole owner of The Dells, despite the fact that Johnson had given him the money to purchase both properties.

Goldstein's testimony therefore clearly reflected that he was testifying as to who gave him the money to purchase the properties, not as to who owned them. The limited scope of his testimony is especially apparent in connection with the property at 9730 So. Western Avenue. Since he testified that Johnson only owned a one-half interest in that property, his testimony could hardly be taken as evidence that Johnson was the sole owner and thus chargeable with the full amount of the expenditures for improvements on the property.

Significantly, Goldstein was not cross-examined at all with respect to any of the other properties or either of the two escrows, Johnson's counsel stating that they had no further information bearing on the matters regarding which Goldstein had testified. (*Id.*, 2 R. 67.) Although Goldstein was kept under subpoena by respondents until the close of the trial six weeks later, no attempt was made to cross-examine him further. (R. 488–489.)

Corroboration of Goldstein's Testimony

Goldstein's testimony is in large part corroborated by the trial record or not disputed. Re-

spondent Johnson himself corroborated Goldstein's entire testimony with respect to the purchase of the Sunny Acres Farm and adjoining Du Page County real estate, admitting that he was the sole owner of the two pieces of property. (Nos. 4 and 5, 1942 Term, 3 R. 982–983.) Title to the Du Page County property, like the other properties as to which Goldstein testified, was taken in the name of a nominee, Isadore Goldstein, and a quitclaim deed subsequently delivered to Johnson. (*Id.*, 2 R. 60.) The deeds to Johnson for the property at 9730 So. Western Avenue were in evidence, showing that a one-half interest was conveyed to Johnson, as Goldstein said. (*Id.*, 2 R. 64.) Johnson admitted that he owned a one-half interest in The Dells (*id.*, 3 R. 955, 977), from which it may be inferred that he received a deed for at least the one-half interest Goldstein unequivocally testified he had. Then there was Johnson's admission, now corroborated by the affidavits of March and Peacock (*infra*, p. 38), that Goldstein transferred full title for Bon Air to him and also delivered the deeds to him (*id.*, 3 R. 973–974), facts which not only corroborate Goldstein's testimony that quitclaim deeds to the Bon Air properties were delivered to Johnson but tend to prove that it was Johnson who gave Goldstein the money to purchase the properties, regardless of whether Johnson may later have

quitclaimed a one-half interest to Skidmore. Further, Johnson's admission that he had a one-half interest in Bon Air, the Curran Farm, The Dells and the property at 9730 So. Western Avenue (*id.*, 3 R. 969, 973, 977, 982, 983) made it as likely as not that he had been the one to give Goldstein the money to purchase those properties. Goldstein's testimony that he made payment in currency has never been disputed, and Johnson was the one person shown by the record to transact his business in currency, admitting that he habitually carried around $12,000 to $15,000 in cash in his pockets (*id.*, 3 R. 965, 976, 985–986). Further, although Johnson denied at the trial that Goldstein had purchased any of these properties for him, in November of 1939 Johnson told revenue agents that Goldstein had bought the property at 9730 So. Western Avenue for him (*id.*, 2 R. 118), that he owned that property and also Bon Air (*ibid; id.*, 4 R. 8) and, when asked about the cost of the properties, referred the agents to Goldstein (*id.*, 4 R. 8).

Although when he testified toward the end of the trial Johnson denied giving Goldstein the money to purchase, or of having any interest in, the Albany Park Bank Building, Goldstein's testimony with respect to this building was corroborated at the beginning of the trial by an admission which Johnson's counsel made in his opening statement in the presence of respondent Johnson.

At that time Johnson's counsel stated (*id.*, 2 R. 3–4):[8]

> We will prove that Mr. Johnson had absolutely nothing to do with this currency exchange [located in the building], had no interest in it whatever, he never cashed a check there, he never exchanged money there, he never bought a money order there, he never received a dime of income from the place.
>
> *Mr. Johnson owned either the building or an interest in the building.* It was an old bank building that went broke when banks went broke in this town. It was put on the market to be sold by the receiver. *Mr. Johnson either by himself or as partner with somebody bought this building as an investment.* It was there being operated. The safety deposit boxes were being rented and operated for the convenience of the people in the neighborhood and for others.
>
> We will prove that there was a woman there in charge of these safety deposit boxes

[8] Johnson's trial counsel later stated in a brief, when the case was first on appeal from the denial of respondents' motion for a new trial, that he was employed by Johnson the day before the case was called to trial and made his opening statement to the jury on the second day of the trial, that he "undertook to get this complicated story" in his mind in the few hours available, that he was in error in stating that Johnson had an interest in the building but that as the trial progressed he forgot about it and did not ask to make a correction after he learned the facts. (R. 334, note.)

> and as Mr. Brown's attorney, Mr. Hess, has said, that this building was rented by the currency exchange for fifty dollars a month, I think it was. *The money was going to the agent who had charge of the building and being spent for any expenses to maintain the building.* Mr. Johnson got no income from this building at all, *but Mr. Johnson did own the building,* * * *. [Italics supplied.]

The agent referred to was Goldstein, for the evidence revealed that after the property was purchased Goldstein reemployed two employees and became "spokesman" for the building as well as the president of the vault company located in the building. (*Id.*, 3 R. 587, 590, 595, 599, 601.) Goldstein's agency will be seen to explain many of his subsequent actions with respect to the building—actions now relied upon by respondents as showing the falsity of his testimony.

It is apparent therefore that the issue as to the falsity of Goldstein's testimony is narrowed to his testimony that Johnson gave him the money and requested him to purchase the properties in question and to make the two escrow deposits. Even this part of his testimony is inferentially corroborated by the facts in evidence.

ALLEGEDLY NEWLY DISCOVERED EVIDENCE ADDUCED ON MOTIONS FOR NEW TRIAL

The evidence which respondents relied upon in support of their motions for a new trial may be

classified into three groups, as follows: (1) Evidence of alleged admissions by Goldstein of the falsity of his testimony; (2) statements and conduct by Goldstein allegedly inconsistent with his trial testimony; and (3) evidence which is either hearsay or merely cumulative of similar evidence introduced at the trial on the issue whether Johnson was the sole owner of some of these purchased properties.

Evidence of alleged admissions by Goldstein of the falsity of his testimony

Hess, respondent Johnson, and Johnson's brother.—Respondents presented the affidavits of Hess, counsel for Johnson's co-defendants at the trial; respondent Johnson; and Johnson's brother, John E. Johnson, an attorney. These affidavits all describe a discussion in Hess' office which took place sometime during the period February to April, 1941, when Hess was writing his brief on appeal from respondents' convictions. (R. 245.) All three affidavits contain almost identical language, such as that Johnson said to Goldstein "Why did you lie?" and that Goldstein replied in substance that "he was sorry that he did but that he was a victim of circumstances." (R. 126–127, 221–222, 234.) Johnson adds that such statements by him and Goldstein were repeated a number of times and that Goldstein said "that he was sorry that he testified as he had." (R. 234.) These affidavits, intended to convey the idea that

Goldstein admitted the falsity of his testimony, are shown by the record to be misleading. Hess was interviewed and asked to clarify some of the statements in his affidavit; he signed a memorandum of the interview which contained the following (R. 246):

> With respect to the statement in Affidavit No. 19, "Goldstein replied in substance that he was sorry that he did." Mr. Hess informed me that he is unable to clarify this statement since that is his best recollection of what was said. Whether Goldstein was endeavoring to excuse himself to Johnson for having testified against Johnson, or was conceding falsity, Mr. Hess would not say.

Thus, Hess, who says he was present during the entire discussion (R. 228), would not say that Goldstein had admitted that he testified falsely, despite the fact that Goldstein is supposed to have made the same statements numerous times. The obvious interest of these affiants, as well as the fact that the alleged statements were made in 1941, shortly after the trial, and were not then adduced, also has a bearing on the weight to be given the affidavits. Reciting these facts, the trial court rejected the affidavits as worthy of but little consideration. (R. 478–479.)

Green.—Only one affiant unequivocally states that Goldstein admitted his testimony was false. Green, a disbarred lawyer working as a salesman in a bakery shop (R. 477), made three affidavits.

In the first one he made no mention of Goldstein's alleged admission (see R. 125–126), despite the fact that respondent Johnson states that Green "volunteered to make known his knowledge and information regarding the matter" (R. 239). In his second affidavit, executed the day following the first one, Green says that "subsequent to October, 1940" (the month the trial ended), Goldstein told him that "his testimony regarding purchases of properties for the said William R. Johnson was false" and that on or about March 15, 1942, Skidmore phoned Green to come over, stated he wanted his advice concerning a partition suit filed by John E. Johnson on the Bon Air property, and that Goldstein, who was present, stated that Skidmore could not file an answer in the suit because if he did it would definitely establish that his trial testimony was false. (R. 100–101.) Green's third affidavit states that after Goldstein knew Green had executed the second affidavit Goldstein waited for Green outside the bakery shop and again admitted the falsity of his testimony.[9] (R.

[9] Engelbretson, an employee at the bakery, corroborates the fact that Green met someone and states that he later identified the person as Goldstein. (R. 232–233.) However, Green says that it was when he left the bakery shop that he saw Goldstein walking to and fro across the street, that Goldstein approached him, and that they then had the conversation Green relates. (R. 216.) Engelbretson, on the other hand, says that when he and Green were in the tavern next to the bakery shop he called Green's attention to the man walking to and fro across the street. (R. 232.)

216.) The trial court rejected these affidavits as too improbable to be true, it being unlikely that Skidmore and Goldstein, a lawyer, would seek the advice of Green, a disbarred lawyer, regarding the partition suit; or that Goldstein, after knowing of the execution of Green's other affidavits, would seek out Green to tell him a second time that his testimony was false; or that Goldstein would make a general admission that his testimony "regarding purchases of properties" for Johnson was false when it is uncontrovertible that a large part of it was true, including his entire testimony with respect to the Sunny Acres Farm and adjoining Du Page County property. For these reasons, the trial court concluded that Green had discredited himself. (R. 477–478.)

Statements and conduct by Goldstein allegedly inconsistent with his trial testimony

Bon Air.—Fowler, a former employee discharged by Goldstein for issuing an unauthorized check (R. 264, 265, 267–268), states that Goldstein told him that he bought Bon Air for Skidmore and that Skidmore gave him the money to buy it (R. 213). If true, this alleged statement by Goldstein is directly in conflict with his testimony that Johnson gave him the money to purchase Bon Air. However, no reason has been advanced by respondents for the acceptance of Fowler's statements in preference to those of their affiant Sperling, floorman and special guard at Bon Air

(R. 104), who states that in June, 1939, Skidmore gave Garry (cashier at Bon Air (R. 105)) a wrapped package, stating that it contained $50,000 "to be applied against *his share of the cost of the property* and the cost and maintenance of the Club" (italics supplied) and that on several other occasions Skidmore delivered money in amounts of $10,000 and $20,000 to Garry, telling Garry to apply the money on his account of cost and maintenance (R. 105). Garry corroborates the fact that Skidmore gave him the $50,000 on one occasion and $10,000 and $20,000 on other occasions, but states that it was for the payment of bills. (R. 107.) If Skidmore was paying for his share of the purchase price of the Bon Air properties in 1939, as Spering testifies, he of course could not have given Goldstein the money to purchase the property in 1937, when the purchase was made. This is the property as to which Johnson admitted Goldstein had transferred full title to him. And, as the Government showed on respondents' motion, even the insurance policies on Bon Air were transferred from Theodore Goldstein, the record title holder, to Johnson. (See particularly, R. 419, 431, 445.)

Albany Park Bank Building: Tax returns.— Incongruously, part of respondents' proof that Goldstein testified falsely consists of evidence intended to show that Goldstein, rather than either Johnson or Skidmore or both, owns the Albany

Park Bank Building—the building which Johnson's counsel in his opening statement, made in Johnson's presence, stated that Johnson owned, having either purchased it himself or as a partner with somebody. Theodore Goldstein is the record title holder of the building, just as he was for Bon Air, one of the properties which Johnson contended he (Johnson) and Skidmore owned equally.

On their amended motion for a new trial respondents placed pivotal reliance upon the filing of amended and delinquent income tax returns by Theodore Goldstein on the rents from the Albany Park Bank Building (AR. 47–74), the returns being the principal new matter submitted to the trial court on the amended motion. These returns were shown to have been filed over Goldstein's protestations that his son was not the actual owner of the building and at the repeated insistence of the revenue agents that Theodore was liable for tax on the rents because he was the record title holder. (AR. 89–112.) Goldstein refused to sign a statement prepared by the revenue agents that his son Theodore was the "owner" of the property; he prepared his own statement to accompany the returns in which Theodore was described as "title holder of record."[10] (AR.

[10] In view of this statement and the consistent position taken by Goldstein throughout his dealings with the revenue agents, the Circuit Court of Appeals' suggestion that if

111–112.) The circumstances surrounding the filing of the returns corroborate rather than refute the credibility of Goldstein's trial testimony regarding the building, even though the affidavits of revenue agent Wodrick (AR. 104–105, 109–110), filed by the Government, reflect that Goldstein does not know whether it was Skidmore's or Johnson's money that Johnson gave him to purchase the building or, of his own knowledge, who the owner is—facts which respondents might have ascertained if they had cross-examined Goldstein at the trial regarding the purchase of this building.

Other evidence reflects instances in which Goldstein, having become "spokesman" for the building when it was purchased (*supra*, p. 24), continued to act as agent for the building. Blockus states that after the building was placed in receivership on July 26, 1943, because of a tax lien, Goldstein offered to apply the rents from the building on the delinquent taxes. (R. 198–200.) Leases were handled through Goldstein and executed in the name of Theodore Goldstein, the record title holder. (R. 200–206; AR. 76–77, 78–85.) Sampson, upon whose affidavits the Gov-

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Theodore was not the beneficial owner of the property, the returns were perjurious, is incomprehensible. Whether the record title holder was legally liable for the taxes, and whether he was legally entitled to personal deductions, are of course questions not before the courts in this case.

ernment has relied, in an affidavit submitted by respondents states that Goldstein made the statement to him that "Johnson never had any interest in the property and has nothing whatever to do with it." (AR. 77–78.) The statement was supposed to have been made in a conversation regarding a lease option. It can be interpreted as meaning that Johnson has never had anything to do with the operation, maintenance or leasing of the building and must be considered with relation to the admission of Johnson's counsel that Johnson owned the building, having either bought it himself or as a partner with somebody. Naturally, Goldstein continued to act as agent for the building, for Johnson would not be likely to assert his ownership while his case was still pending in the courts and his property all tied up by a Government tax lien.

Blockus also states that in his conversations with Goldstein regarding the state tax lien on the Albany Park Bank Building Goldstein said the property was his and also that the Government had a lien on it. (R. 198–200.) Goldstein's statement that there was a lien on the property was in effect an assertion that Johnson owned the building, for the lien is one on all funds and property belonging to Johnson. (See R. 252, 249–250.)[11] One of

[11] The Circuit Court of Appeals' reaction to this tax lien was that Goldstein "had no more right to collect and retain the rent without authority from Johnson, which he did not have, than he had to collect rent on any other building to

Goldstein's alleged statements that the property was his—a statement which would be inconsistent with the statement that there was a lien on the property—was supposed to have been made when Levine and Sampson were present at the county treasurer's office. Both Levine and Sampson testified that they were present during the whole conversation between Goldstein and Blockus and that they did not at any time hear Goldstein make a statement that the property was his (R. 262–263), although, in an affidavit submitted by respondents, Levine subsequently said he did not hear all of the conversation between Goldstein and Blockus (R. 228–229).

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which he was a stranger" (AR. 215) and, as to the $7,500 escrow, referred to later, that (AR. 222)—

"If there is any method known to the law by which one man's money can be held by another under such pretext, we do not know about it. On its face it sounds unreasonable and unbelievable. The record shows that Johnson owes money to the government and, according to Goldstein, he has $7,500 which belongs to Johnson in his possession with the government's knowledge and the government does nothing about it."

The record shows that Johnson's brother, in addition to Goldstein, has stated that there is a tax lien on Johnson's property and funds. (R. 249–250.) We are advised by the Bureau of Internal Revenue that a number of individuals and companies were served with liens on Johnson's property and funds, that Goldstein was served on April 3, 1940, and that the Government has not attempted to make collection, it being customary in cases of this kind, where there has been a criminal trial and where the matter is still pending before the Tax Court, to postpone collection until such time as a final decision has been reached as to the income tax liability.

In other words, this evidence regarding the Albany Park Bank Building merely reflects that Goldstein is continuing to act as agent for the building and that transactions with respect to it are being carried on in the name of the record title holder, in the same manner that all of Johnson's gambling establishments were operated under the ostensible proprietorship of others. This evidence does not reflect who the true owner is. The only evidence respondents offer on that point is contained in the affidavit of Miss Sommer, a former stenographer in Goldstein's office, who states that she typed income and disbursement statements of the vault company located in the building and mailed them to Skidmore (R. 165–166)—the inference being that Skidmore owns all or a part of the building. Miss Sommer's statements are refuted by Goldstein's submission of typed copies of the income and disbursements statements shown to have been prepared by a Miss Koop, an employee at the vault company. (R. 254–259.) Even if it were to be concluded from Miss Sommer's testimony that Skidmore owns part of the building, that conclusion would not be inconsistent with Goldstein's trial testimony that he purchased the building at Johnson's request with money furnished him by Johnson and subsequently delivered a quitclaim deed to Johnson.[12]

[12] The Circuit Court of Appeals considered it "illuminating" that no mention is made of the quitclaim deed to Johnson in the affidavit of Theodore Goldstein, the son, filed by

Escrows.—Respondents' evidence in respect of the two escrow deposits on unconsummated sales tends to prove only that the $10,000 deposit belongs to either Johnson, Skidmore or Goldstein. By affidavit, Goldstein admits that when the escrow agreements were not fulfilled by the vendors he served notice cancelling them, receiving the $7,500 escrow deposit, which he did not return to Johnson because of the Government's lien, but not receiving the $10,000 escrow deposit. (R. 260–261.) Guild (trustee for the property involved under the $10,000 escrow agreement, R. 138–139) and Holleran (attorney for the beneficiaries and trustee, R. 128–129) both corroborate Goldstein in his statement that the vendors had not fulfilled the terms of the $10,000 escrow agreement (R. 130–132; cf. R. 141). Holleran and Guild state, however, that in their discussions with Goldstein respecting the withdrawal of this $10,000 escrow deposit Golstein said the money was his. (R. 133, 141, 214.) Henricksen, on the other hand, states that Skidmore told him the money was his. (R. 95.) More significant than this inconsistent testimony

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the Government on the amended motion, and concluded that the Government has "abandoned its effort to defend this portion of William Goldstein's testimony." (AR. 218.) This affidavit related to Theodore Goldstein's tax returns and the circumstances of their filing. It was filed for the purpose of meeting the contention of respondents based upon these returns. We did not conceive of the proceedings on the amended motion as amounting to a retrial of the case by affidavit.

is respondents' own disclosure that the $10,000 escrow agreement resulted from the institution and dismissal of a trespass suit relative to property located between Bon Air and the Curran Farm (R. 133, 141), properties in which Johnson admits he has a one-half interest.

Whatever significance the testimony of Holleran Guild and Henricksen might otherwise have is dissipated in an affidavit filed by the Government. Sullivan, attorney for Guild in the trespass suit, states that he suggested to Goldstein that there was no lien on the $10,000 escrow and that part of it could be applied in settlement of the Bon Air trespass suit and that Goldstein refused to withdraw and pay over the money out of the escrow fund unless Sullivan obtained a letter or some form of written authority from Johnson, stating that he would follow Johnson's instructions in making disposition of the fund. (R. 250.)

Hearsay and cumulative evidence

All of the rest of the evidence submitted by respondents on their motions is either hearsay evidence or evidence which is substantially identical to that submitted at the trial by respondents. The hearsay evidence, consisting of alleged statements by Skidmore,[18] would of course be inad-

[18] See R. 81, 83, 84, 88–90, 93, 95, 96–97, 97–99, 109, 126. Some of this hearsay evidence is directed toward a showing that Goldstein's trial testimony as to Bon Air was false. Henricksen, the caretaker at Bon Air (R. 83–84) who testified as a state witness in the Roger Touhy and

missible on a new trial. The otherwise cumulative evidence bears only on the question whether Johnson was the sole owner or only had a one-half interest in Bon Air (including the Curran Farm) and The Dells. The evidence as to The Dells is repetitious of that produced at the trial [14] and the most important part of it submitted through the affidavits of Hare and Herman, persons who testified at the trial for the defense. (R. 474.)[15] The evidence as to Bon Air reflects acts of ownership of Bon Air by Skidmore,[16] just as did a great deal

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Hugh Banghart trials and described his own active participation in the kidnapping of John Factor (R. 277), states that Skidmore told him that he bought Bon Air, that Johnson would have a one-half interest in it but Johnson did not know about it yet, and that he bought the Curran Farm and did not intend to let Johnson have an interest in it (R. 84, 93.) Nadherny, who testified at the trial, states that he heard Skidmore say that he bought the Green House (one of the Bon Air properties) as a surprise gift to Johnson. (R. 98–99.) These statements reflect their own unreliability as proof. For instance, Henricksen states that Skidmore said he did not intend to let Johnson have an interest in the Curran Farm, whereas Johnson has admitted that he owns a one-half interest in it. Nor could the Green House have been a surprise gift to Johnson, for Johnson has admitted that he paid one-half of the cost of all of the Bon Air properties, including the Green House.

[14] Cf. R. 117–118, 231–232 with Nos. 4 and 5, 1942 Term, 3 R. 926–927.

[15] See also, R. 95, 175, 177–179, 189.

[16] R. 81–82, 85–86, 87–88, 89, 90, 91–92, 93–94, 97, 99, 102, 103–104, 104–105, 106, 107–108, 108–109, 112–113, 114, 119, 120–122, 124–125, 125–126, 166–167, 169–170, 173, 174–175, 176–177, 186, 191–192, 192–193.

of respondents' trial evidence. Some of these affiants testified at the trial and others were subpoenaed but not called to testify. (R. 474–475.) Peacock, who also was subpoenaed by respondents (R. 342–343) but not called to testify, and Miss Marsh reveal that titles to the Bon Air properties and Curran Farm were transferred to Johnson and that deeds signed by Johnson and conveying a one-half interest to Skidmore were prepared (R. 163–164, 188). This evidence, on which the Circuit Court of Appeals has placed so much reliance (AR 224–225), was before the jury through respondent Johnson's testimony (Nos. 4 and 5, 1942 Term, 3 R. 964) and might have been corroborated at the trial by Peacock, since he was under subpoena by respondents. Aside from the fact that the preparation of deeds conveying a one-half interest in Bon Air to Skidmore is merely cumulative evidence on a trial issue, the fact that full title was first transferred to Johnson tends to support Goldstein's testimony that Johnson gave him the money to purchase Bon Air.

On the issue of the falsity of Goldstein's trial testimony, the trial court was also required to consider Goldstein's denials that he made the incriminating statements attributed to him by respondents' affiants, as well as his explanations and reiteration that it was Johnson who gave him the money to make the escrow deposits and to

purchase these properties."[17] And, as we have already shown, the trial proceedings alone reflected substantial support for the conclusion that Goldstein's testimony was true in its entirety.

ACTION OF TRIAL COURT ON RESPONDENTS' AMENDED MOTION

After refreshing his recollection of what transpired at the trial both times he passed on respondents' motion for a new trial (R. 466–474, 515–516; AR. 168–169) and exhaustively reviewing the motion evidence (R. 474–514; AR. 151–167), Judge Barnes, the trial judge, concluded (AR. 167–168):

> Having considered in detail each separate item of allegedly newly discovered evidence, including not only that now proposed by the movants to be presented to a jury, but also that by their motion filed in 1943 proposed by the movants to be presented to a jury, the court finds and holds that each and every such item is excluded from the classification "newly discovered evidence warranting a new trial" by at least one of the elements of the rule of law applying in such cases and above stated. All but a few items are merely cumulative of other like items presented at the trial. No adequate reason has been presented for the delay of more

[17] See R. 243, 248–249, 251–252, 252–253, 254–259, 260, 260–261, 263, 265.

than four years in the presenting of these merely cumulative items. All items which are not merely cumulative, are merely impeaching. The merely impeaching items are found in the proposed testimony of defendant Johnson, John E. Johnson, a brother of defendant Johnson, Hess, attorney at the trial for Johnson's co-defendants, Fowler, a dischärged employee of Goldstein, Green, a disbarred lawyer, and Sampson, who makes an affidavit filed December 4, 1944. All of the defendants have known, or are charged with knowledge of, all impeaching items which they seek to present through the testimony of Johnson, John E. Johnson, and Hess since the spring of 1941,—two and one-half years before they were called to the attention of this court. Johnson has known of the matters proposed to be related by Fowler since at least as early as September, 1942, more than one year before it was presented. No adequate reasons have been presented for these delays. The movants have not been diligent as to these items. Green's impeaching evidence is denied by Goldstein (as are all the other items) and, because of its inherent improbability and its source, is not by the court considered worthy of belief. Sampson's alleged impeaching evidence is not in fact impeaching and furthermore is denied by Goldstein. The court does not believe that Goldstein recanted, does not believe that he perjured himself on the trial and, on the contrary, believes that he was quite

circumspect. The facts are that Goldstein on the trial told (with one exception) only what the various escrow papers and records compelled him to tell. That one exception was the source of the currency that he deposited in the various escrows. His testimony as to the source of the currency is corroborated by the facts and circumstances in evidence. Johnson is the one person referred to in the evidence who habitually used currency in large amounts (and not bank checks) and habitually kept very large sums of currency on hand. Goldstein's purchase for Johnson of Sunny Acres Farms is a corroborating circumstance. Finally, the court finds and holds that the allegedly newly discovered evidence is not such or of such nature as on a new trial would probably produce an acquittal. The court concludes that the amended motion for a new trial on the ground of newly discovered evidence should be denied.

REASONS FOR GRANTING THE WRIT

1. The decision below, it is submitted, calls for review by this Court no less urgently than did the decision of the court below on appeal from the respondents' conviction. See *United States* v. *Johnson*, 319 U. S. 503. The majority of the Circuit Court of Appeals has ordered a new trial four and a half years after conviction, upon proceedings begun when this Court affirmed the convictions, and after those proceedings had resulted in a denial of a new trial by the Dis-

trict Court, unanimous affirmance of that denial by the Circuit Court of Appeals, and a second denial of a new trial by the District Court. A new trial has now been ordered by two of the four judges who have passed on the matter, despite the fact that virtually all the material considered by the court below was before it when it previously affirmed the denial of a new trial, and despite the earlier statement of the court below, abundantly justified, that the trial court had considered the motion for new trial "with painstaking effort and meticulous care." R. 583.) The decision is based on so serious a departure from the accepted course of review of the granting or denial of motions for new trial, and in the process discloses so great a misapprehension of the significance of the material presented, that it casts an unwarranted reflection upon the conduct of the case and opens the way to indefinite prolongation of criminal proceedings. To leave the case in its present state without submitting it to the supervisory power of this Court would be a disservice to the cause of administration of the criminal law.

The action of the majority below rests primarily upon its conclusion that the testimony of the Government's witness Goldstein concerning the Albany Park Bank Building was false. The nature of that testimony and its setting in the case as a whole has been indicated in the Statement (*supra*, pp. 10–20). Goldstein testified, supplementing and explaining documentary evidence of escrow agree-

ments, that he purchased certain properties, including the Albany Park Bank Building, with currency received from Johnson, that title was taken in the name of a nominee, and that quitclaim deeds were subsequently executed to Johnson. The corroborating evidence has also been indicated (*supra*, pp. 20–24); no newly discovered motivation for falsity has been suggested.

All the proof offered in support of the amended motion for new trial concerned Goldstein's testimony relative to the Albany Park Bank Building, as the court below noted (AR. 209). In overturning the decision of the District Court and its own prior decision on appeal respecting the truthfulness of Goldstein's testimony, the court below had before it, as did the District Court in passing on the second motion for new trial, tax returns executed by Goldstein's son in the summer of 1944, which were interjected in the case on the eve of action by this Court upon respondents' petition for certiorari and the Government's opposing brief on an attempted review of the earlier denial of a new trial. See Nos. 153 and 154, 1944 Term. These returns, taken together with the circumstances surrounding their preparation, show,—what was testified to by Goldstein at the trial and was never in dispute,—that the record title to the Albany Park Bank Building was in the name of his son. The returns were filed at the insistence of revenue agents that the record holder of the title

was bound to return the income from the property, and with a written explanation by Goldstein that record title was in his son, after refusing to sign a statement acknowledging actual ownership. See *supra*, *p.* 30. From this episode the majority below drew the astonishing conclusion that Goldstein has now "decided to repudiate the contention that the property was Johnson's and claim it for himself" (AR. 219.). In concluding that Goldstein or his son was in truth the beneficial owner of the building, the court below not only gave an altogether perverse significance to the tax returns, but it ignored the fact that the pattern of title was the same in this instance as it was with respect to other properties in which respondent Johnson himself admitted ownership, record title having been taken in the name of Goldstein's nominee. Goldstein acted as agent from the time this building was purchased and would naturally continue so to act at a time when Johnson was not likely to take any action to reflect his ownership. Indeed, the building in question was described by Johnson's counsel in his opening statement at the trial as having been bought by Johnson, either himself or as a partner with someone else, the rents being collected and applied to the maintenance of the building by an agent. See *supra*, pp. 22–24. The evidence disclosed that the agent was Goldstein. These statements of Johnson's counsel, though later argued to be erroneous, were made in Johnson's presence and never corrected during

the trial. Nor was Goldstein himself cross-examined with respect to the Albany Park Bank Building transaction, though he was so cross-examined as to certain other properties and though he remained under subpoena by the defendants for the duration of the trial. (R. 488–489.) The effort, now successful, to attribute ownership of the building to Goldstein or his son, was aptly characterized by the trial court (AR. 166):

> In the light of that admission made on the trial, it approaches the absurd and fantastic that courts should now, more than four years later, be considering motions for a new trial on the ground of newly discovered evidence as to the ownership of the building whose ownership was admitted.

It was the filing of tax returns on this property, in the circumstances described, that produced a transformation of the case in the court below.

When we pass from the tax returns and turn to the evidence which had been before both courts on the earlier motion, we find similarly artificial inferences now being drawn. It is not practicable here to examine in detail the evidence which we have attempted to analyze thoroughly in the Statement. Certain items which were regarded by the majority as of major significance may, however, be noted.

What the court below described as "the most remarkable disclosure in this record" (AR. 224) was contained in affidavits of Miss Marsh and

Peacock, asserting that titles to the Bon Air properties and Curran Farm were conveyed by Goldstein's nominees to Johnson, and that Johnson subsequently executed quitclaim deeds of a one-half interest to Skidmore, which were drawn and acknowledged by affiants at Golstein's request. Aside from the circumstance that these affidavits were before the courts below on the original motion, the facts alleged were before the jury through Johnson's testimony (Nos. 4 and 5, 1944 Term, 3 R. 963–964), and Peacock was under subpoena by respondents at the trial but was not called. These affidavits, far from demonstrating that Goldstein testified falsely, actually support his testimony. The fact that Johnson received full title to Bon Air and Curran Farm from Goldstein's nominees corroborates Goldstein's trial testimony that quitclaim deeds were delivered to Johnson, and also tends to prove the truth of Goldstein's testimony that Johnson gave him the money to purchase the properties. The execution by Johnson of quitclaim deeds to Skidmore of a one-half interest in the properties is cumulative evidence on the issue whether Johnson was the sole owner of Bon Air, an issue which was before the jury on extensive and conflicting evidence, see *supra*, pp. 14–17, and as to which Goldstein was not cross-examined or Peacock called.

A "circumstance alone, unexplained as it is, which comes close to establishing the falsity of

Goldstein's trial testimony" in the view of the majority below (AR 220) was the leasing of the Albany Park Bank Building by Goldstein, as asserted in an affidavit of Sampson. In a statement sharply critical of the trial court's conclusion that this affidavit is not inconsistent with Goldstein's trial testimony, the court below said: "We suppose, according to this reasoning, if Goldstein should lease this property from now until eternity and retain the rents as long as he lives, it would not be inconsistent with his testimony that he purchased this property for and conveyed the title to Johnson." (*Ibid.*) Again the court has overlooked the pattern of arrangements under which Goldstein's nominee took record title to properties in which Johnson admitted having an interest, and the likelihood that Goldstein would continue to act as agent during a period when Johnson would hardly disclose his ownership. Similarly the court below, dealing with the evidence as to escrow deposits (*supra*, pp. 35–36), regarded it as "unbelievable" that "one man's money can be held by another" in pursuance of a tax lien unenforced by the Government (AR. 222). The evidence was not only believable but was in harmony with the facts regarding the Government's lien. (See *supra*, note 11, pp. 32–33.)

The affidavits alleging recantation by Goldstein have been discussed *supra*, pp. 25–28. Their acceptance by the court below on the second appeal, as

against the trial court's reasoned disbelief and acceptance of Goldstein's affidavits, is difficult to explain in terms of the function of the reviewing court. The treatment of the Hess affidavit is illustrative. This affidavit, together with those of Johnson and his brother, recited an interview with Goldstein in Hess's office while Hess was preparing a brief on appeal from the original conviction. The affidavit, said to disclose recantation by Goldstein, was not brought to the attention of any court at that time. The court below stated that it did not think the affidavit of Hess is capable of the construction placed on it by the District Court, namely, that it "could as well be taken to mean that he [Goldstein] was sorry he had testified at all, as it could be taken to mean that he was sorry he had lied". (AR. 213.) The fact is that the trial court was not inventing an ambiguity in Hess's affidavit, but was repeating Hess's own explanation. Hess himself signed a memorandum (R. 247) affirming that he would not say "Whether Goldstein was endeavoring to excuse himself to Johnson for having testified against Johnson, or was conceding falsity" (R. 246; see p. 26, *supra*). When the court below concluded that "any kind of logic or reason of which we are aware requires the acceptance of Hess's version as true and that of Goldstein as false" (AR. 213), it was not merely reversing the trial court on an issue of credibility without adequate foundation, but it

was doing so upon a patent misapprehension of what "Hess's version" was.

2. The majority below declined to apply the established rule that motions for a new trial on the ground of newly discovered evidence will not be granted, where the newly discovered evidence is merely of an impeaching or cumulative character, unless it would probably result in a verdict of acquittal on a new trial.[18] The court instead applied the test of whether evidence subsequently shown to have been perjured may have affected the outcome of the trial already had. This rule has properly found application in cases of recantation by a witness. All the federal cases cited by the majority in support of its position were addressed to that situation. In *Pettine* v. *Territory of New Mexico*, 201 Fed. 489 (C. C. A. 8), an important witness recanted and asserted that he had been intoxicated at the time of his trial testimony. In *Martin* v. *United States*, 17 F. 2d 973 (C. C. A. 5), the court referred in dictum to the rule applicable where a witness admits that he testified falsely or that he was mistaken. In *Larrison* v. *United States*, 24 F. 2d 82, a prior decision of the court below, the court denied remand for the purpose of passing on a motion for new trial,

[18] See, *e. g.*, *Weiss* v. *United States*, 122 F. 2d 675, 691 (C. C. A. 5); *Long* v. *United States*, 139 F. 2d 652, 654 (C. C. A. 10); *Johnson* v. *United States*, 32 F. 2d 127, 130 (C. C. A. 8); *Baird* v. *United States*, 279 Fed. 509, 512 (C. C. A. 6).

but stated the requisites for a new trial in the case of recantation, as in fact that case was. Thus the quotation given by the majority below from that case must be read as applicable to recantation; the standard applicable where the court is "reasonably well satisfied that the testimony given by a material witness is false" (AR. 228) has reference to a recantation followed by a repudiation thereof,— the situation presented in the *Larrison* case itself.[19]

The court extended the so-called rule of the *Larrison* case to a case where there has been no recantation, but on the contrary vigorous reassertion of the witness's trial testimony. We should have no quarrel with an extension of that rule to a case where there has been a clear and convincing showing of perjury, found by the trial court. But the majority below, in order to extend the rule regarding new trials for impeaching or cumulative evidence, was obliged to make a preliminary departure from recognized practice in undertaking to review *de novo* the affidavits submitted to the trial court and on that basis reversing the trial court's findings. This is a departure both from

[19] In *State* v. *Mounkes*, 91 Kans. 653, 138 Pac. 410, the final case cited by the majority below, testimony given by a government witness a few minutes before the close of the case was later shown by conclusive evidence to be false: the fact drawn in issue was whether a school yard contained a flower bed surrounded by stones. The evidence brought forward after the trial showing the existence of that physical fact, by photographs and otherwise, was beyond dispute.

the established precedents and from the purport of Rule 2 (3) of the Criminal Appeals Rules, which contemplates that the trial court, and not the Circuit Court of Appeals, shall be vested with responsibility for determinations of fact on motions for new trial. Indeed, the majority below regarded it as improper for the trial court to avail itself of its impressions of the challenged witness and of the defendant, who had both testified at the trial and who both made affidavits. The majority believed that if such impressions were to be availed of, the trial court should have called for oral testimony by the other affiants, though no request for such testimony was made, and even in reversing there is no remand for that purpose but an outright grant of a new trial.

By virtue of these departures, the court below did not consider what effect the impeaching evidence would have on a new trial. It seems plain enough that the District Court was right in concluding that the result would probably not be altered in the event of a new trial. Cross-examination of Hess (if he were to testify) would reveal, as the present record does, that he could not say that Goldstein had admitted that he tesified falsely. Since Hess was present during the entire discussion regarding which respondent Johnson and his brother might testify, a jury would hardly believe Johnson and his brother if they were to state that Goldstein did admit the falsity

of his testimony during this discussion. In the face of this, on a new trial respondents plainly would be forced to employ the tactic they adopted in the trial already had—which was for Johnson to make denials and state that he heard Goldstein "testify to a lot of other things that are not true." (Nos. 4 and 5, 1942 Term, 3 R. 977.) Fowler and Green could be placed on the stand on a new trial, but their testimony, even if believed despite the circumstances shown by the present record impeaching their credibility, would add little to what was before the jury on the first trial when a Government witness twice testified (*id.*, 2 R. 73, 87) that the defendant Wait (who was acquitted) had stated that part of Goldstein's testimony was false. None of the hearsay evidence submitted by respondents on their motion would be admissible in evidence. Indeed, the jury could believe that Goldstein's testimony was partially false and still return verdicts of guilt amply supported by the evidence. As this Court recognized (319 U. S. at 516), the "ownership of gambling houses" theory of proof was the predominant part of the Government's case, established by a "voluminous body of lurid and tedious testimony," and independently supports the verdicts. In addition, the proof on that theory would still be corroborated by the "expenditure" theory of proof even if Goldstein's testimony were disbelieved entirely and even if Johnson's testimony regarding his

expenditures on these properties were accepted in preference to the Government's other evidence.

3. We are sensible of the obligation of the Government, no less than of the courts, to prevent a miscarriage of justice in a criminal case, particularly where perjury of a witness is charged. For that reason, the Government undertook an investigation in the present case (*supra*, p. 5). We recognize also that motions for a new trial, and the jurisdiction of appellate courts to review orders thereon, are important instruments in preventing injustice. But we are compelled to recognize also that justice may miscarry in different ways, and that motions for a new trial and appellate review thereof may themselves contribute to a frustration of justice. It is doubtless upon a balance of these considerations that the practice has become established of reposing in the trial court judicial discretion in connection with the granting or denial of new trials, and of limiting appellate review, where no bias is charged to the trial court, to the question whether the court is shown to have abused that discretion. This practice was properly followed on the earlier appeal in the present case. Departure from it on the second appeal has served to demonstrate, it is submitted, the soundness of the practice itself.

Review by this Court is sought to correct such a departure. In exercising its supervisory power, this Court will not be required to assume an undue

burden. The opinions of Judge Barnes and Judge Minton, point the way.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for writs of certiorari should be granted.

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Acting Solicitor General.

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